No. 20,873

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED FRUIT COMPANY,
Appellant,

vs.

MARINE TERMINALS CORPORATION,
Appellee.

APPELLANT'S REPLY BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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THE RECORD

In its Statement of the Case, Appellee, under headings (a), (b) and (c), asserts three disputes with Appellant:

(a) Appellee quotes "No one from the vessel thereafter went into the access trunkway" from Appellant's Brief (p. 4). This statement was taken out of its context, in which it pertains only to the period *before* the stevedore took over control at San Francisco. On the other hand, the testimony cited by Appellee relates only to the period *after* the stevedore took over. Appellant's Brief, however, makes clear that Appellant does not argue that none of its employees entered the area at the later period (see Appellant's Brief, p. 17).

(b) Appellee quotes Appellant's statement that the longshoremen took the boards and "sometimes placed

them in the storage rack'' from Appellant's Brief, p. 2, and challenges the quoted portion on the basis of testimony of laborers Teixeira and Heffernan.

Mr. Wilde definitely saw longshoremen place some of the bin boards in the rack on some occasions (R. 5, p. 26). Chief Mate Neilsen regularly cleaned up the holds of the ship with the crew of the ship *after* the vessel left San Francisco and was at sea, and *always* found some bin boards already replaced in the rack (R. 7, pp. 130-137).

It is true that longshoreman Teixeira testified that longshoremen ''never'' placed bin boards in the rack, and it is also true that longshoreman Heffernan, who was *not even on the ship* on the day of the accident (R. 4, p. 23), testified that longshoremen ''never'' but bin boards into the rack. However, neither man was in the bridge 'tween deck (the level from which the bin board fell) at the time that the bin boards were admittedly dismantled from their side slots by other longshoremen on the morning of the day in question, and neither witness could possibly know what the particular longshoremen employees of the stevedoring contractor, *none* of whom testified on behalf of their employer, actually did with these bin boards on that particular day. After the incident Teixeira found several boards safely in the rack (R. 2, p. 22), indicating clearly that someone had recently placed some boards in the rack.

(c) Appellee quotes ''The particular bin board was in place in its side slots when the ship came into San Francisco'' from Appellant's Brief, p. 6, and, while pointing to no contrary evidence, claims that this statement was supported only by custom and practice.

There was ample testimony by Captain Bornholdt, Chief Mate Neilsen, and Chief Engineer Cardin (R. 6, p. 28; R. 7, pp. 99-105, pp. 159-161), that the bin boards in *this* particular ship on *this* particular voyage one day before the accident were in fact *all* in place in the side slots before the stevedore assumed control. No one from the vessel thereafter went into the access trunkway until the stevedore took over control (R. 7, pp. 122-125).

The stevedoring contractor has not pointed to a single portion in the record which disputes the above testimony in any respect concerning this particular voyage, or any other voyage. After combing the record on appeal, the only evidence which the stevedore says in any respect contradicts the testimony of these three senior officers of the vessel with years of actual seagoing experience, is the testimony of a temporary day laborer, Gang Boss Teixeira, who in one sentence in cross-examination offered an *opinion* to the effect that only two bin boards might be necessary to hold the bananas in place when the ship was at sea (Appellee's Brief, p. 6).

There is no evidence that Teixeira *ever* saw on this day, or any other day, how many bin boards were necessary to hold the bananas in place at sea, or that he had any factual basis for any opinion as to how many boards were necessary to hold the bananas in place at sea. In addition, he could not possibly have known on this particular day how many bin boards actually held the bananas in place at the bridge 'tween deck (from which the bin board subsequently fell), because he never worked in that area, and never looked at that area until a few seconds before the accident. When Teixeira did look, the bin

boards had already been taken down by the other longshoremen who worked the bridge 'tween deck level that day.

THE ARGUMENT

I. THE CONTRACT

Appellee seeks to avoid the effect of the written contract by oral testimony of two of its laborers, Teixeira and Heffernan, to the effect that the access trunkway was, in their opinion, not a "working area" (Appellee's Brief, p. 4), whatever that may mean (obviously bananas were not stowed in the trunkway). Appellee does not dispute that the access trunkway and bin board arrangement was built at the request of the longshoremen, for the use of longshoremen, and was used in fact by longshoremen for many years.

Appellee apparently seeks to avoid the burdens of control placed upon stevedores by the United States Department of Labor in Code of Federal Regulations, Title 29, Chapter XIII, § 1504.25, which specifically fixes responsibility for the safety of ladders and their accessibility upon the stevedore, and thus clearly brings ladder spaces within the area of "stevedoring operations," or as appellee prefers to call it, the "working area."

Appellee also asserts that "the District Court gave full consideration to the provisions of the contract . . ." (Appellee's Brief, p. 4), but does not cite any portion of the record for this statement. The District Court quite evidently forgot about the written contract. Appellant can give no other reasonable explanation for the Court's total

failure to mention the contract in its Memorandum Opinion and Findings of Fact and Conclusions of Law (R. 1, p. 94), which were prepared by the Court.

II. THE FINDING OF FAILURE OF PROOF THAT THE BIN BOARD WAS ACTUALLY MISPLACED BY A LONGSHOREMAN

Appellant has already dealt with Appellee's assertion concerning the question of whether United Fruit Company employees may possibly have been in the access trunkway at some time after the stevedore assumed control, but before the minute of the accident, under (a) *supra*.

Appellee, at page 6, points to one sentence of the testimony of temporary laborer Teixeira and asserts that the record supports the inference that the Chief Mate, the Captain, and the Chief Engineer, all senior seagoing officers with extensive experience, were incorrect in asserting that all of the bin boards were in their places in side slots when the ship came into San Francisco. Appellant has dealt with this portion of the Argument under (c) *supra* in this Reply Brief. In addition, the Court certainly can understand that the stevedoring contractor would have countered the testimony of the three senior ship's officers on this point with its own senior supervisory personnel, had there been any real question as to the accuracy of the officers' testimony. The same stevedoring contractor worked these identical ships once a week for almost four years between 1957 and 1961 (R. 7, p. 206). In fact, the District Court never made any finding indicating that it doubted the testimony of the ship's officers concerning this issue.

Appellee, at the bottom of page 7 and the top portions of page 8, admits that only longshoremen demounted the bin boards from their side slots. Appellee also does not challenge the fact that only longshoremen ever handled bin boards while the vessel was in San Francisco. The vessel is a place of limited access, open only to longshoremen and United Fruit Company personnel. If United Fruit Company personnel never handled the bin boards in any respect while the ship was in San Francisco, and there is no contrary evidence, who is left to have placed the bin board in its precarious position after it was demounted, other than one of the 35 longshoremen working for Appellee in the No. 1 hold of this vessel?

Appellee also states (p. 8) that Appellant's employee Wilde observed no mishandling of the bin boards on the day in question, and that this somehow aids Appellee. The admitted fact is that although Appellee and its employees had immediate notice of the accident, they never reported the accident to Appellant. Appellee even went so far as to send its Insurance Manager, Captain Reitsma, to investigate aboard the ship on the day of the accident (R. 7, p. 191), but he too, said nothing to Mr. Wilde or to anyone else from United Fruit Company about the accident. Appellant finds the stevedore's reluctance even to report the accident to United Fruit Company inconsistent with the stevedore's protestations of innocence concerning the misplacing of the offending bin board.

In fact, Appellant finds Appellee's failure to offer any explanation for the accident, except to claim that the vessel cannot prove that a particular longshoreman misplaced the bin board, very strange, in the face of the

admitted fact that 35 employees of Appellee worked in the No. 1 hold on the day in question, the admitted fact that only longshoremen were in the immediate area of the accident at the moment of its occurrence, the very stringent control burdens under the written contract, and the warranty of safe and proper performance under the decision in *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation,* 350 U.S. 124, 1956 A.M.C. 9.

CONCLUSION

For the foregoing reasons we submit that the Judgment in favor of Marine Terminals Corporation should be reversed with directions to enter a judgment in favor of United Fruit Company upon its third-party Complaint.

Dated, San Francisco, California,
February 10, 1967.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I hereby certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

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Of Attorneys for Appellant.